

No. 18,839 ✓

IN THE

**United States Court of Appeals**  
**For the Ninth Circuit**

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ZIEGLER CHEMICAL AND MINERAL CORPO-  
RATION, a corporation of New York,  
*Plaintiff and Appellant,*  
VS.

AMERICAN GILSONITE COMPANY,  
a corporation of Delaware,  
*One of the Defendants*  
*and Appellee.*

**APPELLANT'S OPENING BRIEF**

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FILED

JAN 30 1964

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This is an appeal from the summary judgments rendered in the United States District Court for the Southern District of California, Northern Division.

The complaint (Vol. I p. 1) by plaintiff Ziegler Chemical and Mineral Corporation (hereinafter referred to as Ziegler Chemical) alleged, *inter alia*, violations of the antitrust laws of the United States through illegal conspiracies, combinations, acts in restraint of trade, interference, intimidation and harassment of plaintiff and its customers and misuse of patents by defendants.

Defendant American Gilsonite Company (hereinafter referred to as American) has counterclaimed (Vol. I p. 45) against plaintiff for \$9136.00, which amount allegedly due to said American is based on settlement of disputed claims for alleged past infringement of a patent by customers of Ziegler Chemical.

Ziegler Chemical alleges in its complaint that the patent in suit is invalid.

In the counterclaim American seeks to recover \$9136.00 in the first cause of action upon an alleged "account stated" and in the second cause of action upon an independent promise to pay that sum.

The District Court filed its Memorandum of Decision and Order granting said defendant's Motion for Summary Judgment on the first and second causes of action of the counterclaim on June 20, 1963 and judgment was accordingly entered on June 20, 1963. (Vol. I p. 100.)

Appellant has appealed from said judgment by filing its notice of appeal on July 18, 1963. (Vol. I p. 107.)

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#### **JURISDICTIONAL STATEMENT**

Jurisdiction of the District Court was based on U. S. Code, Title 28, Section 1337 and Title 15, Section 15, said suit arising under the antitrust laws of the United States.

Jurisdiction of this Court is founded under U. S. Code, Title 28, Section 1291.

### STATEMENT OF THE CASE

The issues raised by the pleadings.

Ziegler Chemical sues American and other defendants for treble damages under the antitrust acts and for declaratory judgment under the patent laws.

American filed an answer together with a counterclaim. (Vol. I p. 45.) The counterclaim alleged first and second causes of action seeking recovery of the sum of \$9136.00 against Ziegler Chemical alternately upon an alleged account stated (first cause of action) and upon an independent promise to pay that sum (second cause of action).

Ziegler Chemical in its answers (Vol. I p. 62) to said causes of action of the counterclaim denied the charging allegations of both causes of action.

American moved for Summary Judgment on the first and second causes of action of its said counterclaim (Vol. I p. 66) under Federal Rules of Civil Procedure, Rules 54(b) and 56, on affidavits and exhibits attached to the affidavits.

Ziegler Chemical opposed the motion and filed affidavits in opposition with exhibits attached. (Vol. I pp. 80 et seq.)

The Court granted the Motion for Summary Judgment, upon said first and second causes of action of said counterclaim for the single sum of \$9136.00 with interest at 7% per annum thereon from February 1, 1959. (Vol. I p. 100.)

Judgment was accordingly entered on June 20, 1963. (Vol. I p. 106.) There was entered also an "Order Re



Stay of Enforcement of Judgment" (Vol. I p. 105), staying enforcement of said Summary Judgment until the entering of judgment upon Ziegler Chemical's complaint, provided Ziegler Chemical file satisfactory bond. Ziegler Chemical filed such bond.

**Documentary evidence.**

The following constitute all the documentary evidence pertaining to said first and serond causes of action of said counterclaim:

1. Letter dated April 10, 1958 from Ziegler Chemical to American (Exhibit A of Goodner affidavit) as follows (Vol. I p. 74):

"In line with our telephone conversation just now this is to confirm our willingness to pay you back royalties wherein we sold Gilsonite for underground pipe insulation.

"I appreciate your willingness to give us a little time to do this and we will offer a payment plan for your approval shortly."

2. Letter dated April 14, 1958 from American to Esso notifying Esso that Ziegler Chemical will pay royalties on Esso installation (Vol. I p. 75), as follows:

"At the request of the G. S. Ziegler & Company, we are writing you to state that they have agreed to pay us the royalties due on all past installations of their Tri-sul-ite. If you have such an installation, their payment to us will remove any infringement which may now exist.

"They have also arranged with us for the rights under our U. S. Patent 2,668,125 to extend the



rights to practice the inventions of this patent on all future installations.”

3. Letter dated December 15, 1958 (Exhibit D of counterclaim (Vol. I p. 61) and Exhibit A of Owen affidavit (Vol. I p. 79)) was sent by the sales manager of Ziegler Chemical to American reading as follows:

“At long last we have completed our work with regard to determining the back royalties due you under the above patent.

“According to our records, the total comes to \$9,136.00 covering the period of 1954 to the end of February, 1958, since which time, as you know, we have been reporting and paying monthly. Our yearly tonnage figures were as below:

“1954	40 tons @ \$8.00	\$ 320.00
1955	28 “	224.00
1956	180 “	1,440.00
1957	773 “	6,184.00
1958	121 “	968.00
	<hr/> 1,142	<hr/> \$9,136.00

“What with all the expenses incurred this year with respect to our TRI-SUL-ITE Division, we would like to defer putting these back royalties on our books until next year, and for which reason we hope you will not mind our setting this up for payment in January of next year.”

4. The report by American’s auditor dated December 21, 1961 (Exhibit A of Ziegler affidavit) in part on page 9 (Vol. I p. 93) reads as follows:

“As to shipments prior to March 1, 1958, a letter from Ziegler to American indicates royalties

payable of \$9,136 as of that date. After deducting the amount received of \$644 indicated above, we understand that there is a balance due of \$8,492. We were unable to determine whether this balance is shown on the books of Ziegler. In response to our inquiry, Mr. Ziegler said that he had discussed the balance with you about a year ago and that he had heard nothing further from you about it. We assumed from our conversation with Mr. Ziegler that his company did not expect to pay any further amounts on this balance."

5. Letter of American to Ziegler Chemical dated January 12, 1962 (Vol. I p. 95):

"Without waiving any right we may have to additional sums of money which a complete audit of your Company's books may show to be due us, we demand, and call upon you for immediate payment of, the following:

"1. The amount of \$4,449.40, said sum being the deficiency revealed by the enclosed report of Lybrand, Ross Bros. & Montgomery.

"2. The amount of \$9,136, said sum being the amount of the back royalties owing us in accordance with the account stated in your letter to us dated December 15, 1958.

"Again without waiving any additional rights which we may have under the license agreements between our companies, we also make demand upon you that we be permitted immediate access to such books and records as will permit our auditors to verify all of your sales of Gilsonite, both domestic and foreign, upon which royalty was owing. Please advise us promptly of the date

upon which such records will be made available for review by our auditors.”

#### Summary of affidavits.

1. In an affidavit, E. F. Goodner (Vol. I p. 70), at one time chief executive officer of American, alleged in substance that negotiations were had with the predecessor of Ziegler Chemical between 1954 and 1958 regarding certain charges that Ziegler Chemical's predecessor sold gilsonite to users who by the use of such gilsonite allegedly infringed a U. S. patent of American; and that American allegedly obtained judgments against two such users; and that Ziegler Chemical offered to pay royalty on a particular installation and requested Goodner to assure Esso Standard Oil Co. that the latter would not be charged with patent infringement because Ziegler Chemical will pay the royalty; Goodner alleges he refused to write such letter until Ziegler signed a license agreement; nevertheless upon receipt of Ziegler's letter of April 10, 1958 (above quoted) Goodner instructed an employee to so assure Esso Standard Oil.

These Goodner allegations are contradicted in the counter-affidavit of Ziegler (Vol. I p. 80) wherein Ziegler admits that American threatened customers of Ziegler Chemical with patent infringement suits and otherwise harassed such customers between 1954 and 1958 and that in order to avoid further harassment Ziegler Chemical agreed to submit “an offer” for settlement of the controversy subject to an offset for expenses caused to Ziegler Chemical by such harass-

ment; and Ziegler Chemical alleges (and pleads in this case) that the patent under which American Gilsonite threatened customers was and is invalid, hence American had no ground for such threats.

2. American also filed an affidavit of Earl H. Owen (Vol. I p. 76) who describes himself as an officer and employee of American; alleges the ownership of the patent in suit by American; then alleges that he was *informed* by Goodner on April 14, 1958 about the execution of a license agreement between Ziegler Chemical and American for a royalty of \$8 per ton. He also alleges that he was *informed* by Goodner that Mr. Gordon S. Ziegler had promised in writing to pay an amount equal to \$8 per ton on all gilsonite sold by Ziegler for the practice of said patent from the date of the issuance of the patent, February 2, 1954, to the date of execution of the agreement, April 10, 1958. Then Owen confirms the instruction to inform Esso Standard Oil that "payment by Ziegler in accordance with his written promise would remove any infringement on the part of Esso arising out of the fact that they had practiced the patent in an underground pipe insulation." Owen identified Exhibit B attached to the Goodner affidavit as the letter he wrote to Esso. This letter is dated April 18, 1958. Then Owen alleges that he contacted Mr. O. G. Clement, an employee of Ziegler Chemical, regarding the accounting allegedly promised by Ziegler Chemical to compute the exact amount owing by Ziegler Chemical to American. Owen then alleges the receipt of the letter of December 15, 1958 signed by O. G. Clement, sales manager for G. S.

Ziegler Co., and alleges "American Gilsonite Company accepted this accounting as accurate and has never disputed Mr. Clement's computation set out in said letter."

3. In the counter-affidavit of Ziegler (Vol. I p. 80), Ziegler alleges with reference to the "figures" set forth in Exhibit A "that in an effort to ascertain the approximate amount which might be due to defendant American, Ziegler Chemical's sales manager made an approximate computation, the results of which are set forth in defendant's Exhibit B to affidavit of Earl H. Owen."

"That the figures set forth in said Exhibit A did not constitute an account stated but were merely tendered as an estimate with the offer that they would be 'put on the books' subject to further negotiations as to net amount due either party."

Ziegler further alleges "that the aforesaid figures were never put on the books of plaintiff."

"That defendant never acquiesced in nor agreed that said figures were correct nor alleged that said figures were an account stated until the commencement of this action."

Ziegler attached to his affidavit as Exhibit A the audit of December 22, 1961 made of Ziegler Chemical's books by American's accountants and called attention to page 9 of said audit (Vol. I p. 93), and further alleged "not only was the amount reported different than that alleged herein to be an account stated but the existence of a controversy over and lack of agree-



ment as to what, if anything, was due is clearly set forth in said Exhibit A.”

4. In the counter-affidavit of Oren G. Clement (Vol. I p. 98) he also alleges that Exhibit A attached to the affidavit of E. H. Owen was a computation “to estimate the amount of back royalties which might be due, if any.” Further Clement swears “that defendant at no time agreed to or acquiesced in said figures, but on the contrary ordered an audit and accounting of the books of plaintiff.”

Clement further swears that “at no time did plaintiff intend” such figures as an account stated and that “because of the inability of plaintiff and defendant to agree on amount due to one from the other as the result of past transactions, no amount was ever placed on plaintiff’s books to the credit of defendant.”

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**POINTS ON WHICH APPELLANT  
RELIES ON THIS APPEAL**

1. The Trial Court erred in granting the Summary Judgment on the First Cause of Action of the Counterclaim herein, because the pleadings herein presented genuine issues of material fact, and because the pleadings, and alleged admissions on file in this case together with the affidavits, show that there are genuine issues as to material facts and that the moving party is not entitled to a judgment as a matter of law.

2. The Trial Court erred in granting the Motion for Summary Judgment because the opposing affidavits on file considered together with the pleadings

show genuine issues of material facts, as to state of mind and intention of the parties with regard to the transactions involved; as to the purpose and nature of the audit of defendant's records; as to actual meeting of the minds of the parties with regard to the exact amount of alleged indebtedness; and as to the liability of defendants.

3. The Trial Court erred in granting the Motion for Summary Judgment on the Second Cause of Action on the Counterclaim, because the pleadings show genuine issues of fact as to an alleged promise by defendant to pay, and no affidavits were filed in support of the Motion for Summary Judgment on the Second Cause of Action of the Counterclaim; and if the affidavits in support of the Motion for Summary Judgment on the First Cause of Action are also considered in support of the Motion for Summary Judgment on the Second Cause of Action, then the Court was in error in considering such affidavits which so far that they pertain to the alleged promise by defendant are based on hearsay and not on personal knowledge by the affiant.

4. The Trial Court erred in granting of Summary Judgment on both causes of action because there are substantial questions as to the credibility of witnesses and the weight of evidence as set forth in the conflicting affidavits of the parties in this case, and it is desirable to permit the opposing party an opportunity at a trial to cross-examine the witnesses of the moving party; and the evidence in the affidavits is such that conflicting inferences could be drawn therefrom.



5. The Trial Court erred in granting the Summary Judgment in disregarding the rule that the evidence presented by the affidavits are to be liberally construed in favor of the party opposing the Motion for Summary Judgment; and that the opposing party be given the benefit of all favorable inference which might be reasonably drawn from the evidence; and that facts asserted by the party opposing the motion and supported by affidavits must be taken as true, and the rule that any doubt as to the existence of an issue of fact is to be resolved against the party moving for Summary Judgment.

6. The Trial Court erred in ruling that there is no substantial issue of fact as to the existence of account stated of the first cause of action of the counterclaim.

7. The Trial Court erred in holding that there was no genuine issue of fact as to defendant's alleged promise to pay.

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### **ARGUMENT**

The sequence of this argument shall follow the sequence of the points on which appellant relies on this appeal.

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#### **1. THE PLEADINGS AND THE AFFIDAVITS RAISE GENUINE ISSUES OF MATERIAL FACTS.**

Ziegler Chemical in its answer to the counterclaim denies the existence of an account stated or any independent promise to pay any amount, therefore issue is joined in the pleadings on these two causes of action. In this respect the instant case distinguishes

from the type of cases where liability or the existence of such an account stated or such promise to pay was admitted in the answer. Consequently no summary judgment would lie on the basis of the pleadings alone.

The affidavits in support as well as in opposition of the motion for summary judgment were heretofore analyzed in brief and are in direct conflict as to material facts.

For instance Ziegler in his affidavit swears that the letter of December 15, 1958 was merely one phase of the overall negotiations to settle the then existing claims and counterclaims between the parties. In particular Ziegler at that time contended in his negotiations with Goodner that whatever amounts may be found to be due for alleged past infringement by customers would be reduced by whatever amount it cost Ziegler Chemical to counter the harassment on the part of American in connection with the same customers. Goodner in a general way admits that there were such oral negotiations with Ziegler but in his affidavit limits the negotiations to only two customers. Ziegler Chemical is certainly entitled to a full hearing as to this phase of negotiations.

Goodner is entirely silent in his affidavit as to Ziegler's demand with regard to Ziegler Chemical's costs and expenses due to said harassment.

Goodner in his affidavit admits that Ziegler agreed only in general to "promise in writing to pay royalties" on all past sales prior to the license agreement, but Goodner, who after all during all the times at

issue was the chief executive of American does not mention at any time that Ziegler ever made a specific promise *to pay any specific amount*. It is remarkable that Goodner, who actually conducted the negotiations with the chief executive of Ziegler Chemical does not allude at all to the letter of December 15, 1958.

With regards to the affidavit of Owen, it is purely hearsay. Owen swears that Goodner, the Chief executive of American *told* Owen that Goodner and Ziegler were negotiating and that Ziegler "promised in writing to pay an amount equal to \$8 per ton on all gilsonite sold by Ziegler . . . to the date of execution of the agreement on April 10, 1958." But no affidavit on either side refers to otherwise or produces any such agreement of April 10, 1958 unless Owen had in mind the subsequent license. This is ambiguous, because there is a letter of April 10, 1958 in which there is no mention made at all of "\$8 per ton" or any amount. It merely confirms Ziegler's "willingness" to pay back royalties and states that Ziegler will "offer a payment plan" *for approval*. Ziegler Chemical is certainly entitled to have testimony to this effect under proper cross-examination and ascertain from Owen as to what "agreement of April 10, 1958" he has reference to and just what is the basis of the allegations in his affidavit. Also Ziegler Chemical is entitled to examine Mr. Owen as to the source of his information, if any, as to the allegations that American accepted the letter of December 15, 1958 as an accurate accounting and has never disputed the computations in that letter. After all, it is evident from the two affidavits in sup-

port of the motion for summary judgment that while Mr. Owen did contact Mr. Clement regarding this computation, neither Mr. Owen nor Mr. Clement pretended to have either the position or the authority to finalize the negotiations then in progress between the chief executive of American, Mr. Goodner and Mr. Ziegler. It is evident that Mr. Owen was an underling under Mr. Goodner and it was not his decision to accept or reject any figures or any offers from Ziegler Chemical. It is significant that there is no allegation of such acceptance of any offer in the affidavit of the chief executive of American, Mr. Goodner. At any rate there is no agreement of April 10, 1958 regarding any specific amount of back royalties to be paid to American. The letter of April 10, 1958 is a general promise and it cannot form the basis of an account stated or a promise to pay a specific amount.

One thing is clear from the Goodner and Owen affidavits and that is that Mr. Owen did what he was "instructed" to do by Mr. Goodner, and Mr. Goodner does not swear to ever accepting or approving any specific amount of indebtedness offered by Ziegler. This is a material issue of fact which should be fully litigated and not determined on vague and confusing affidavits of the type sworn to by Goodner and Owen.

The evidence before the Court was further contradictory when consideration is given to the report of the accountants of American attached to the Ziegler affidavit. On pages 8 and 9 of that report (Vol. I pp. 92, 93) American's own accountants reported on



“royalties received and receivable”, which indicates an audit of December 1961 of the same items on which allegedly an agreement had been already reached. As to the balance owing on the alleged account, the accountant stated “we were unable to determine whether this balance is shown on the books of Ziegler. In response to our inquiry, Mr. Ziegler said that he had discussed the balance with you about a year ago and that he had heard nothing further from you about it. We assumed from our conversations with Mr. Ziegler that his company did not expect to pay any further amounts on this balance.” Ziegler Chemical is entitled to examine the accountants or produce proof in connection with the confusion regarding this account and also to examine both Mr. Owen and Mr. Goodner as to their recollection of the substance of the negotiations alleged in the Ziegler affidavit.

All the above contradictions are material to the issues of the “account stated” and “promise to pay a specific amount” and therefore under the general rules pertaining to grounds for summary judgment the motion for summary judgment should have been denied.

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**2. THE CONSIDERATION OF THE OPPOSING AFFIDAVITS INVOLVE DETERMINATION OF THE STATE OF MIND AND INTENTION OF THE PARTIES WITH REGARD TO THE NEGOTIATIONS INVOLVED.**

There is substantial body of authority that where motive, intent, subjective feelings and reactions were to be searched, and examination and cross-examina-

tion are necessary instrument in obtaining the truth, the issues may not be disposed of on summary judgment. (3 Barron & Holtzoff Federal Practice and Procedure, 111 et seq. paragraph 1232.2.)

The affidavits in the instant case refer to the state of mind and understanding of Goodner and Ziegler, and Owen and Clement regarding the intent of their conversations and correspondence. Particularly the intent as to how the final amount, if any, owing for past infringement by Ziegler's customers should be determined.

Ziegler Chemical is entitled to introduce evidence before the Court to prove the actual tenor of the negotiations and thereby negate any implied contract or implied agreement based on a single letter which formed only one phase of the overall negotiations. Ziegler Chemical is also entitled to cross-examine both Goodner and Owen as to their recollection of the Ziegler allegations.

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**3. THE AFFIDAVITS IN SUPPORT OF THIS MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION ARE BASED ON HEARSAY AND NOT ON PERSONAL KNOWLEDGE.**

It is a basic rule of summary judgment proceedings that the affidavits must be on personal knowledge and not on hearsay. (3 Barron & Holtzoff Federal Practice and Procedure, 164 et seq. paragraph 1237.)

Even a cursory reading of the Owen affidavit which is the only affidavit that refers to any promise to pay

any specific amount, shows that Owen swears merely that he was told by Goodner as to what Goodner was told by Ziegler but he of his own knowledge does not know and was never the witness to any promise to pay any specific amount.

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**4. QUESTIONS OF CREDIBILITY OF WITNESSES AND THE WEIGHT OF EVIDENCE OUGHT NOT BE DETERMINED ON MOTION FOR SUMMARY JUDGMENT.**

“If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied.” (3 Barron & Holtzoff Federal Practice and Procedure 134, par. 1234, n. 77.)

The Goodner affidavit alleges that there was a promise to pay back royalties, but does not allege that any definite amount was ever agreed upon. Owen in his affidavit alleges what he had *heard* from Goodner and then alleges the receipt of the letter of December 18, 1958 from Clement, and that American did not dispute the letter.

On the other hand Ziegler and Clement allege that the letter of December 18, 1958 was intended only as an estimate and was only a phase of the continuing negotiations and was subject to final adjustment of an amount different from that stated in the letter which was yet to have been agreed upon.

The credibility of Goodner and Clement as to the substance of the negotiations, the conduct of the parties, their conversations and the weight of the same as against any implication based on that single



letter, are vital and Ziegler Chemical is entitled to elicit the whole truth from those affiants by way of proper cross-examination.

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5. THE AFFIDAVITS WERE NOT LIBERALLY CONSTRUED IN FAVOR OF ZIEGLER CHEMICAL, OPPOSING THE MOTION FOR SUMMARY JUDGMENT.

The party opposing the motion should have been given the benefit of all favorable inferences which might reasonably be drawn from the evidence. "Facts asserted by the party opposing the motion and supported by affidavits or other evidentiary material, must be taken as true." (3 Barron & Holtzoff Federal Practice and Procedure 140, par. 1235.)

If the Ziegler and Clement allegations were to be taken as true, then the only inference that could be drawn from the evidence and affidavits would be that the total amount due to American was unliquidated and therefore there was neither an "account stated" nor an enforceable "promise" to pay any specific amount.

At any rate the Goodner and Owen affidavits if liberally construed in favor of the opposer of the motion for summary judgment, would not support a finding of either an "account stated" or a "promise" in a *liquidated amount*. Goodner merely alleges a general promise of an unliquidated amount. Owen merely alleges the receipt of the letter of December 15, 1958, and that American never disputed that letter. But this last statement of Owen is not corroborated even

by Goodner, the then chief executive of American who was admittedly in charge of the negotiations with Ziegler.

In other words the terms and nature of the agreement admittedly were to be determined by negotiations between Goodner and Ziegler. Owen and Clement, respectively "Secretary-Treasurer" and "sales manager" were merely in charge of the books to furnish some figures for the principal negotiators Goodner and Ziegler. Hence the affidavits liberally construed would support the only inference that the total settlement amount due to American was not a liquidated amount.

Additionally doubt is cast upon the contentions of American as to "account stated" and "promise" by the subsequent conduct of the parties. Namely American did not demand payment at all for three years and before demanding payment had their own accountant audit the books of Ziegler Chemical, and prior to making such demand American was advised by its own accountant of the posture of Ziegler denying any debt in such specific amount.

According to well established rules pertaining to summary judgment doubts as to the existence of such issue of facts should have been resolved in favor of Ziegler Chemical and against the motion for summary judgment.

6. **THERE ARE ISSUES OF MATERIAL FACTS AS TO THE "ACCOUNT STATED" OF THE FIRST CAUSE OF ACTION OF THE COUNTERCLAIM.**

An "account stated" is not merely a single unanswered communication or letter, it involves the overall conduct of the parties to establish a definite and certain intent that a liquidated amount has been agreed upon as a final settlement of claims and counterclaims then existing between the parties.

"The action upon an account stated is not upon the original dealings and transactions of the parties . . . It is upon the new contract by and under which the parties *have adjusted their differences and reached an agreement.*"

*Gardner v. Watson*, 70 Cal. 570.

As heretofore discussed in this brief the conduct of the parties in this case in 1958 and thereafter is inconsistent with a conclusion that these parties "have adjusted their differences and reached an agreement." It is evident from a review of the affidavits that these parties never adjusted their differences, hence the Court was in error in disposing of this important issue of material fact by summary judgment.

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7. **THE ALLEGED "PROMISE" OF THE SECOND CAUSE OF ACTION WAS MERELY A PROMISE TO OFFER A PLAN.**

The only evidence of "promise" as such is in the letter of April 10, 1958 attached to the Goodner affidavit which letter only *confirms the willingness to pay back royalties* and states that Ziegler Chemical

*will offer* a payment plan. The subsequent letter of December 15, 1958 furnished a tentative figure to form the basis of negotiations for a payment plan. But these parties differed right up to the present suit as to what the ultimate liquidated amount should be.

Again the conflicting affidavits, as above discussed, raise issues of material facts as to the existence of a liquidated amount on which a common count predicated on a promise to pay a liquidated amount could be based.

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### CONCLUSION

In general the Trial Court was in error in weighing the conflicting affidavits and in effect trying the case on its merits on such affidavits. The Court resolved disputed fact issues by reference to the affidavits contrary to well established rules of law, as summarized in 3 Barron & Holtzoff Federal Practice and Procedure 129, where in footnote 58 there is cited as an authority for such rule *Lane Bryant, Inc. v. Maternity Lane Limited, of Cal.*, C.A. 9th 1949, 173 F.2d 559, in which case at page 564 Justice Stephens stated:

“The affidavits upon their broadest application do no more than to present to the trier of fact evidence upon material issues. They do not absolve the issues as matters of law. Therefore the judgment cannot validly be based upon the summary trial by affidavits. The plaintiff-appellant is entitled to have its complaint responded to by answer and both parties are entitled to have the issues tried through the introduction of exhibits

and witnesses produced for direct and cross-examination.”

It is respectfully urged that the Trial Court was in error in granting the motion for summary judgment and that the judgment should be reversed.

Dated, San Francisco, California,  
January 28, 1964.

Respectfully submitted,

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